No. 86-337

In the Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, PETITIONER,

v.

OKLAHOMA TAX COMMISSION, et al., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS OKLAHOMA TAX COMMISSION AND ITS MEMBERS

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QUESTIONS PRESENTED

Whether 49 U.S.C. §11503 proscribes *de facto* discrimination resulting from the state's appraisal (overvaluation) of rail transportation property for ad valorem tax purposes?

Whether, in an overvaluation case, the United States District Courts may require a preliminary showing of purposeful overvaluation with discriminatory intent to establish subject matter jurisdiction conferred by 49 U.S.C. §11503?

Whether the United States District Courts may decide fundamental subject matter jurisdiction conferred in 49 U.S.C. §11503 without an evidentiary hearing?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATUTORY PROVISION INVOLVED

The statute involved was originally enacted as §306 of Pub.L.No. 94-210, 90 Stat. 31, 54 (1976) (49 U.S.C. §26c), the Railroad Revitalization and Regulatory Act, and recodified in Pub.L.No. 95-473, 92 Stat. 1337, 1445-1446, (1978) (49 U.S.C. §11503), the Revised Interstate Commerce Act of 1978 (hereinafter §11503).

Most of the courts of appeals, including the Tenth Circuit, in deciding cases under §11503, have used §306 for purposes of statutory analysis. *Burlington Northern Railroad Company v. Lennen*, 715 F.2d 494 (10th Cir. 1983), cert. denied, 467 U.S. 1230 (1984) (hereinafter *Lennen*); *Ogilvie v. State Board of Equalization*, 657 F.2d 204, (8th Cir. 1981), cert. denied 454 U.S. 1086 (1981); *Clinchfield Railroad Company v. Lynch*, 700 F.2d 126 (4th Cir. 1983); and *Richmond Fredericksburg & Potomac Railroad v. Department of Taxation*, 762 F.2d 375 (4th Cir. 1985).

The language of §306 never became effective. The effective and controlling language is §11503. It is the language with which the states must comply under the Supremacy Clause, U.S. Const., art. VI, cl.2. The clarified language of §11503 should be interpreted in this statutory construction case. That language is:

> §11503. Tax discrimination against rail transportation property
>
> (a) In this section —
>
> (1) "assessment" means valuation for a property tax levied by a taxing district.
>
> (2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.
>
> (3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.
>
> (4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.
>
> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to

> the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.
>
> (3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.
>
> (c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If

the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section —

> (1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and
>
> (2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

STATEMENT OF THE CASE

1. *The Proceedings Below*

Petitioner, hereinafter BN, sought relief under 49 U.S.C. §11503 in the United States District Court for the Western District of Oklahoma from an alleged *de facto* assessment ratio discrimination in violation of §11503 (b) (1). BN alleged this violation resulted from an excessive appraisal or valuation for 1982 ad valorem tax purposes. (Pet.App. 23a to 34a). BN alleged that the full system value (appraisal value) of its rail transportation property, as assigned by the Respondents, the Oklahoma Tax Commission and its

members, hereinafter OTC, for 1982 ad valorem tax purposes was $3,574,921,544.00, but that the true and correct full system value of its rail transportation property for 1982 was, according to BN's expert, $1,495,253,000.00; and, that the OTC assigned full system value for 1981 was $2,107,321,200.00. (Complaint, ¶¶25, 28 and 34, Pet.App. 29a to 31a). BN therefore claimed the OTC violated §11503 (b) (1) by assessing BN's rail transportation property at a value (assessed value) that has a higher ratio to true market value (appraisal value) than the ratio of the aggregate assessed value of other commercial and industrial property to the aggregate true market value.

BN did not contest the OTC's allocation factor whereby a portion of its rail transportation system value was allocated to Oklahoma. BN did not contest the statewide average assessment level, 10.87% assessment ratio, at which commercial and industrial property subject to valuation and assessment by the county assessor was assessed for 1981 ad valorem taxation. And, BN did not contest the OTC's 1981 sales assessment ratio study, either as to the method of valuation of commercial and industrial property or as to the method of sampling. BN complained that the 1982 valuation exceeded the 1981 valuation, thus it was retaliatory; and that it exceeded the 1982 valuation of its expert fee appraiser, thus it was illegal.

The OTC contradicted BN's allegations relating to the 1981 valuation before the district court. The 1981 assessed value of BN's rail transportation property and the taxes thereon had not been challenged. (J.A. 44 and 50). The 1981 assessed value was based upon a system valuation or appraisal of $3,641,689,619.00, allocated to Oklahoma at 3.75%, or an Oklahoma fair cash value of $136,563,361.00, and assessed at 10.99% or an assessed value of $15,014,650.00. All these figures are supported by official state records. (J.A. 44 and 50). BN had reported

its 1981 assessed value for its Oklahoma taxable property at $14,335,355.00. (J.A. 47).

In support of its allegation that the OTC valued its rail transportation system for 1981 at $2,107,321,200.00, BN offered the district court handwritten notes of the Ad Valorem Tax Director. These notes were calculations of valuation based on net book cost less obsolescence and the necessary assessment percentage to arrive at or near the assessed value as calculated by the prescribed valuation, allocation and assessment procedures applied to all rail transportation systems in Oklahoma.[1] (J.A. 75 to 83).

The OTC, in answer to the complaint, admitted the existence of a valuation dispute. The OTC admitted BN's expert disagreed with the hypothetical true market value calculated by the OTC. The OTC moved to dismiss the complaint for lack of subject matter jurisdiction under §11503 and 28 U.S.C. §1341.

The district court ordered BN to file a statement of its jurisdictional facts in accordance with the holding in *Lennen:* that §11503 does not confer jurisdiction upon the federal district courts to maintain an action alleging a pure valuation dispute unless the railroad can make a strong showing of purposeful valuation with discriminatory intent. BN's statement of jurisdictional facts asserted that the OTC had

[1] These handwritten calculations preserved by the railroad tax representatives do not appear in any of the files and records of the Respondents. They are seriously inconsistent with the various official documents detailing the valuations and assessments of the BN's rail transportation property for 1979, 1980 and 1981. Attention is directed to BN's admission that these calculations were made at informal conferences between its tax representative and the Ad Valorem Tax Director. The calculations on these notes relied upon by BN before the district court and this Court, BN's Brief, pages 9 and 10, apparently reflect an acceptable valuation and an acceptable method of valuation, even though the cost approach is denounced by BN's expert, who relies solely on the income approach. These notes were not used to challenge the official 1981 assessment of BN's property. These handwritten calculations first surfaced in this litigation.

practiced systematic and intentional tax discrimination against railroads for many years; that the OTC assessed railroad property without regard to known conditions essential to a just determination or to proper valuation methodology and without principal reliance upon the income indicator of value; that the OTC manipulated valuations to perpetuate the statewide aggregate assessed valuation base; and, that any change in valuation methodology by the OTC was result-oriented, to maintain the tax base.[2] (J.A. 74 to 85).

Notwithstanding the artfully plead complaint and the voluminous discovery material filed by BN, the district court dismissed the complaint[3] for lack of subject matter jurisdiction under §11503, 28 U.S.C. §1341 and *Lennen, supra.* BN's Motion for New Trial was denied, the Court having considered the facts bearing on jurisdiction in the light most favorable to BN, announced that live testimony would have lent nothing to BN's abortive attempt to establish a prima facie case of intentional discrimination. (J.A. 127).

[2] These various arguments were involved in *Great Northern Railway v. Weeks,* 297 U.S. 135 at 151 (1936) (known economic conditions of the depression); *Norfolk & Western Railway v. Missouri State Tax Commission,* 390 U.S. 317 (1968) (disregard for a reasonable valuation formula, strong evidence tending to show mileage formula yielded grossly distorted results); *Sunday Lake Iron Company v. Township of Wakefield,* 247 U.S. 350 (1918) (14th Amendment protects against intentional, systematic undervaluation of other taxable property or something which amounts to an intentional violation of essential principle of practical uniformity); and *Chicago, Burlington & Quincy Railway Company v. Babcock,* 204 U.S. 585 (1907) (14th Amendment protects against fraud, arbitrariness or inequality resulting from a scheme or agreement among taxing officers). The United States Solicitor General suggests a jurisdictional test for §11503 similar to these arguments. A requirement of a strong showing of grossly distorted results or systematic discrimination is akin to purposeful overvaluation with discriminatory intent.

[3] Preliminary injunction was issued, allowing BN to pay $484,258.04 of its 1982 ad valorem tax bill into the federal registry. Those funds have been disbursed and continue to be held by the various County Treasurers, not subject to expenditure under 68 O.S. 1981, §2467. The challenged taxes of 1983 remain in the federal registry.

The Court of Appeals for the Tenth Circuit affirmed. This Court granted a writ of certiorari to the Court of Appeals for the Tenth Circuit on October 20, 1986.

2. *The Opinions Below*

The district court, in its order dismissing the complaint, made findings of fact which are critical in the application of the legal and technical language of §11503.[4] The district court found that the dispute arises from the method used in Oklahoma to calculate railroad property values, hypothetical fair cash market value, for ad valorem tax purposes; that the true market value of railroad property is determined by a complex appraisal formula which uses factors of original cost depreciated and capitalized income; that the relative weights assigned to these factors have consistently changed to place emphasis on BN's favored capitalized income factor; and that the changes made by the State in 1982 were done so to achieve uniformity in the assessment process and compliance with §11503. The Tenth Circuit stated that BN did not allege any facts from which a trier of facts could infer discriminatory intent; that the State made changes in an attempt to comply with §11503 and to rectify prior problems; that if there were a pattern of prior overassessments (not overvaluations) it was broken in 1982; and, that BN's expert fee appraisal simply establishes that there was a difference of opinion as to the true market value of BN's rail transportation system.

A simple statement of the issue is: Should a federal court of equity interfere with the state's taxing

[4] The critical importance of these findings of fact is revealed in the legislative history discussed infra, particularly the Doyle Report 87-445 (1961), H.R.Rep. No. 94-725 (1975) and S.Conf.Rep. No. 94-595 (1976). The legislative history suggests that the target of §11503 is deliberate discriminatory assessing or taxing of rail transportation property. The courts below found only intent by the state to eliminate discrimination.

power simply because a railroad's expert appraiser disagrees with the state's valuation?

3. *Ad Valorem Taxation in Oklahoma* (J.A. 15 to 18).

In 1982, Oklahoma instituted changes in the ad valorem tax system to achieve uniformity. The various valuation methods were applied to all similarly situated taxpayers within a valuation class, such as railroad, airlines, distribution companies, transmission companies, telephone companies, etc. A single assessment percentage was applied in each assessment class: real, personal, rail transportation and public service corporation. *Cantrell v. Sanders,* 610 P.2d 227 (Okl.1980), *McLoud Telephone Co. v. State Board of Equalization,* 655 P.2d 1037 (Okl.1982). Equalization was ordered both inter and intra county for the assessed valuation of the property subject to assessment by the various county assessors. *Poulos v. State Board of Equalization,* 646 P.2d 1269 (Okl.1982). These were the needed improvements in ad valorem taxation espoused by the railroads in the legislative history of §11503.

The Oklahoma Constitution, art. X, §8 requires all taxable real and tangible personal property be annually assessed at a value no greater than 35% of its fair cash value for its actual use and empowers the legislature to classify according to use to facilitate uniform assessment procedures; art. X, §21 creates a State Board of Equalization and mandates the Board to annually equalize the valuations of the several counties and to assess all railroad and public service corporation property; art. V, §59 mandates that the local millage (tax levies) be uniform upon all taxable property within the taxing jurisdiction; and, art. X, §9 prohibits the state from levying an ad valorem tax.

The Oklahoma Tax Commission is the state agency required to assist the State Board of Equal-

ization in both equalization of local assessments and valuation and assessment of railroad and public service corporation property. 68 O.S. 1981, §§2454 and 2462. The Oklahoma Tax Commission has supervisory duties over the various elected county assessors, 68 O.S. 1981, §2402 and it prepares an annual study of levels of assessment of property subject to assessment by the county assessors (sales-assessment ratio study which includes individual appraisals and mass appraisal comparables). This study is laid before the State Board of Equalization as a recommendation for equalizing property both within and among the counties according to valuation classes, residential, commercial, industrial and agricu[1] al.[5]

The Oklahoma assessment process for local assessments requires three steps: (1) full value determination, (2) application of assessment ratio to determine assessed value, and (3) application of tax rate. *Cantrell v. Sanders, supra.* Local assessments are equalized at 12% with 3% deviation, or between 9% and 15%. *Poulos v. State Board of Equalization, supra.*

Railroad and public service corporation property assessments require five steps: (1) determination of system value, (valuation) (2) application of allocation factor to determine Oklahoma value, (3) application of assessment percentage to determine assessed value, (4) apportionment to the various local taxing jurisdictions, and (5) application of the tax rate.[6]

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[5] Locally assessed residential and commercial and industrial real property is valued by a combination of the current value of the land and the replacement cost less depreciation of the improvements. Income approach has been unsuccessfully attempted to value income producing properties. Agricultural property is valued on a complex use formula based upon U.S. Corps of Engineers land survey statistics.

[6] In 1957, Oklahoma assessed at 100% of valuation. In 1958, the State Constitution was amended so that property may be assessed at no greater than 35% of its fair cash market value for its use. Okla. Const., art. X,§8.

In 1982 public service corporation property was assessed at 26% of its Oklahoma full cash market (use) value. This assessment percentage was unsuccessfully challenged in *McLoud Telephone Co. v. State Board of Equalization, supra.*[7] Also, in 1982, the three members of the Oklahoma Tax Commission acted to assure that all railroad and public service corporation property was valued according to the same valuation methodology for similar entities and that a uniform assessment percentage for each class, public service corporation and railroad, be applied by the State Board of Equalization to determine assessed value. (J.A. 31-35).

The 1982 valuation formula utilized to determine Oklahoma fair cash value of rail transportation property, going concern or unit valuation, included net book cost weighted at 60% and net rail operating income capitalized at 14% and weighted at 40%. This formula was a studied and deliberate attempt to place more weight on the railroads favored income approach, while reducing the level of assessment or assessment ratio.[8]

SUMMARY OF ARGUMENT

BN's suit raises a fundamental jurisdictional issue inseparable from the principles of federalism and separation of powers. This suit asks the federal courts to interfere in the intricacies of Oklahoma's ad valorem tax system. The relief sought would require the district court to legislate a private system of valuation for ad valorem tax on BN. The injunctive

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[7] Railroad property was not included in the classification of public service corporation property expressly because of §11503. (J.A. 33-34).

[8] J.A. 54, chart of reduction of assessed valuations; J.A. 50, 1981 assessment percentage (ratio) on railroads ranged from 19.75% to 8.25%, BN at 10.99%; J.A. 49, 1981 assessment ratios on railroads, mean 12.49, median 11.11; J.A. 52, Affidavit of David Ray Taylor explaining valuation methodology changes and 1980 progress report.

relief sought asks the court to enforce this private judicial legislation.

On writ, BN asks this Court to remand. This request masks BN's request to disregard the principle of comity. A remand would legislate a new cause of action in the federal district courts.

BN's claim of discriminatory overvaluation is not within the jurisdictional grant of §11503. Congress did not reject jurisprudence which forecloses use of the federal injunction to remedy excessive ad valorem tax valuation. *Railroad Tax Cases,* 92 U.S. 575 (1876). The outcome below of BN's overvaluation complaint was proper.

Section 11503 is an exercise of Congress's Commerce Clause powers. U.S. Const., art. I, §8, cl. 3. The statute limits state and local tax authorities and empowers the federal district courts to prevent violation of those limitations. The structure of §11503 separates the substantive provisions from the procedural provisions. Facially §11503 is far less than a general proscription of any ad valorem tax that results in discriminatory treatment of rail transportation property. Facially §11503 is far less than a general grant of equity jurisdiction to the federal district courts to prevent any state tax that results in discriminatory treatment of rail transportation carriers.

It is obvious, from a plain reading, the language of §11503 is technical and legalistic. Congress is presumed to have used this language in its technical and legal meaning with knowledge of the existing law. *Corning Glass Works v. Brenner,* 417 U.S. 188 (1974). Legislative history reaffirms the conclusion drawn from the careful usage in §11503: Congress intended to use each word in its technical, legal sense.

Congressional history requires a narrow application of both the substantive and the procedural provisions of §11503.

Legislative history identifies the acts within state taxation which Congress intended to proscribe: ad valorem tax equalization, or the lack thereof, which favors other non-rail, commercial and industrial property; or, the levy or collection of a tax rate on rail property higher than the tax rate on other commercial and industrial property. S.Rep. No. 87-445, H.R. Rep. No. 90-1483, S.Rep. No. 91-630 and H.R.Rep. No. 94-725.

Legislative history clearly identifies that Congress intended to prevent the states from imposing ad valorem tax burdens upon rail transportation property greater than that imposed upon other commercial and industrial property. Congress intended this proscription whether the greater tax burden was imposed either by *de jure* classification or by *de facto* equalization.

Legislative history identifies the purpose of the grant of jurisdiction to the federal district court: to provide a remedy where (1) the state court procedure is not adequate; (2) the state court jurisdiction can not be invoked before the tax is due; (3) or the state court remedy requires multiple suits. The legislative history reveals that Congress intended the federal district court to balance the harm to the state and the remedial needs of the rail carrier before taking jurisdiction or before issuing an injunction. S.Conf. Rep. No. 94-525, H.R.Rep. No. 94-725 and S.Rep. No. 92-1085.

Facially the procedural provisions limit federal court relief to equalization discrimination. The legislative history and the statute identify equalization discrimination in comparison to other commercial and industrial property. Judicial review is restricted

to that comparison measure or standard: the sales-assessment ratio study for commercial and industrial property.

Congress rejected overvaluation of rail transportation property as a proscribed act, S.Conf.Rep. No. 94-595; but did set the standard for judicial determination of the aggregate true market value of other commercial and industrial property; and expressly limited its grant of jurisdiction to prevent the proscribed acts. The statute and legislative history support the conclusion that true market value of rail transportation property is not subject to judicial review as an alleged violation of §11503 (b) (1), in the federal district courts.

Accordingly, Congress expressed serious restriction on the exercise of federal equity injunction in cases alleging violation of §11503. The *Lennen* jurisdictional rule is consistent with that Congressional intent.

This case does not involve any constitutionally protected private rights, nor does it involve a dormant commerce clause protection. This case does not compel constitutional interstitial decisional law. *Wardair Canada, Inc. v. Florida Department of Revenue*, ____ U.S. ____, 106 S.Ct. 2369 (1986). Had Congress intended to set a national uniform valuation standard for ad valorem tax assessments of rail transportation property it would have done so. *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978).

Congress intended a very limited lifting of the proscription of 28 U.S.C. §1341 and it intended the continued application of the principle of comity in state tax cases. Legislative history clearly indicates Congress intended the federal district courts to cautiously entertain suits under §11503 to preserve our

system of federalism and avoid constitutional doubt. S.Rep. No. 92-1085.

ARGUMENT

I. FACIALLY §11503 IN TECHNICAL AND LEGAL LANGUAGE PROSCRIBES SPECIFIC ACTS WITHIN STATE TAXATION WHICH DISCRIMINATE AGAINST INTERSTATE COMMERCE AND VESTS EQUITY JURISDICTION IN THE FEDERAL DISTRICT COURTS TO PREVENT THOSE ACTIONS, NOTWITHSTANDING 28 U.S.C. §1341.

BN argues that §11503 is a later act and is intended to be a substitute for the general proscription of §1341. *Herman and MacLean v. Huddleston*, 459 U.S. 375 (1983), is inapposite. The starting point for statutory construction is the language. *Landreth Timber Co. v. Landreth*, ____ U.S. ____, 105 S.Ct. 2297, 2301 (1985). The language of §11503 expresses a restrictive lifting of §1341. And, the structure of §11503 affirms a careful separation of the proscribed acts from the federal court remedy.

Subsection (a) of §11503 defines assessment, assessment jurisdiction, rail transportation property and commercial and industrial property. These definitions engage technical and legal terms clearly indicating specialized meaning. These terms are used in both the substantive provisions and the procedural provisions. Definition for "true market value", the crux of this case, is omitted. Likewise "valuation" is not defined. Valuation is used in the definition of assessment, equating assessment with assessed value.

Subsection (b) also clearly indicates specialized meaning in its proscription. Clause (1) sets up an equation to measure the assessment ratio for rail

transportation property by the assessment ratio of other commercial industrial property. Facially this clause compares assessment ratios of the property of a single taxpayer to the aggregate property of an aggregate of taxpayers. This equation according to BN and the Eighth Circuit mandates the federal district courts to determine true market value of rail transportation property. *Burlington Northern Railroad Company v. Bair*, 766 F.2d 1222 (8th Cir. 1985). True market value was defined in the legislative history, in S.Rep. No. 91-630, H.R.Rep. No. 90-1483. These committee reports, at best, reveal Congressional frustration with the equation language.

Clause (2) proscribes the levy or collection of a tax on an assessment made in violation of clause (1). Clause (3) prohibits the levy or collection of a rate in excess of the rate imposed on other commercial and industrial property in the same assessment jurisdiction. Clause (3) does not limit the measure of a discriminatory tax rate to the taxing jurisdiction. Rather, it contemplates a larger jurisdiction, in Oklahoma either the county or the state, the assessment jurisdiction. This language indicates Congress did not intend to remove flexibility among the taxing jurisdictions in setting tax millage rates.

And, clause (4) prohibits the imposition of another tax that discriminates against rail carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of title 49. This language clearly prohibits imposition of a new tax which is discriminatory after the effective date of §11503. However, it does not prohibit collection of taxes which were in force and effect on the date of enactment of §11503. BN asserts this clause expresses, clearly and plainly, broad application of the entire section to prevent a state taxation which results in discriminatory treatment. Facially this clause is ambiguous. *Richmond, Fredericksburg and Potomac Railroad Company v. Department of Taxation, Commonwealth of Virginia*, 762 F.2d 375 (4th Cir. 1985).

Subsection (c) expressly, but with limitation, lifts the jurisdictional bar of 28 U.S.C. §1341. In its grant of equity jurisdiction, twice Congress clearly expressed recognition of state jurisprudence. Federal court jurisdiction under §11503 is concurrent with other state or federal court jurisdiction, and limited only to prevent a violation of subsection (b). The federal district court is required to follow the heavy burden of proof required by state law. Exercise of this jurisdiction to grant affirmative relief to railroads aggrieved by the state's assessment ratio is limited: "Relief may be granted under this subsection only if the ratio. . ." This language prevents affirmative equitable relief in federal district court to railroads aggrieved by excessive tax rates or other taxes that discriminate. The evidentiary guidelines for exercise of this jurisdiction likewise directly related to the assessment ratio proscription of (b)(1). These evidentiary guidelines clearly, although technically, direct the equity court in determining true market value of other commercial and industrial property.

Careful scrutiny of the language of §11503 precludes broad judicial powers, permitting federal district court review of a single area of the ratio of other, nonrail, commercial and industrial property. Likewise, injunctive relief is permitted only for the purpose of equalizing the state's assessment ratio for rail transportation property of the aggrieved carrier downward to the judicially determined assessment ratio for the other property. The legislative history affirms that Congress was well versed on the lack of equalization by the states and the appropriate equalization tool, the sales-assessment ratio study. S. Rep.

No. 87-499, H.R. Rep. No. 90-1483 and S. Rep. No. 91-630.

II. THE TECHNICAL AND LEGAL LANGUAGE OF §11503 REQUIRES CONSTRUCTION IN ITS TECHNICAL AND LEGAL SENSE.

The legal and technical statutory language does not, on its face, proscribe an excessive true market value. The substantive provisions focus on equality or uniformity in state taxation as between rail transportation property or carriers and other commercial and industrial property or taxpayers. *Richmond, Fredericksburg and Potomac Railroad Company v. Department of Taxation, Commonwealth of Virginia*, 762 F.2d 375 (4th Cir.1985). But the procedural provisions focus only on equalization of assessed values.

This technical and legal language, it is presumed, was used by Congress in its specialized meaning. *Hawley v. Diller*, 178 U.S. 476 (1900). Where Congress has used technical and legal words the statute must be interpreted in the specialized meaning, particularly if demonstrated by the legislative history. *Corning Glass Works v. Brenner*, 417 U.S. 188 (1974). Accord, *Bradley v. United States* 410 U.S. 605 (1973) and *Barber v. Gonzales*, 347 U.S. 637 (1954).

The plain meaning rule, appropriate in *Aloha Airlines Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983) is not enough in construction of §11503. As the Utah District Court noted in *Union Pacific Railroad Company v. State Tax Commission*, 635 F. Supp. 1060, 1067 (D.Utah, C.D. 1986), "Section 306 presupposes that there is such a thing as 'the true market value' of a given railroad, a single formula that in some way relates to reality." At note 10, the Utah court stated, " . . . So Congress's assumption that there is such a thing as 'the true market value' capable of quantification may itself be suspect."

Resort to the legislative history of §11503 and its precursors will assure proper application of this technical and legal language so as not to expand or contract this Commerce Clause exercise by Congress.

III. THE LEGISLATIVE HISTORY OF §11503 AND ITS PRECURSORS EXPLICITLY AND IMPLICITLY EXPRESSES THAT CONGRESS INTENDED MINIMUM FEDERAL COURT INTERFERENCE WITH STATE TAX PRACTICES AND ONLY AS NECESSARY TO ENFORCE THE SUBSTANTIVE PROVISION OF §11503.

Section 11503 is void of any language that suggests a railroad may seek relief in the federal courts from the rigors of state or local ad valorem tax, without showing a serious advantage to other commercial and industrial property and a serious disadvantage to the railroad. Section 11503 is void of any language that suggests a railroad may acquire a serious advantage not enjoyed by all other railroads through individual valuation relief in the federal courts. And, §11503 is void of any language that suggests Congress intended the federal courts to set private, decisional valuation standards for the states.

After review of extensive legislative history, the Tenth Circuit in *Lennen* refused to apply §11503 to the unmentioned area of overvaluation of rail transportation. The *Lennen* decision did not construe the section as a complete lifting of §1341. It fashioned a jurisdictional rule to preserve the expressed purpose of Congress: to prevent intentional equalization discrimination against rail transportation property. The *Lennen* decision allows a railroad to maintain its §11503 action only to remedy deliberate ad valorem tax equalization discrimination. Such a fundamental jurisdictional test is not offensive to the con-

gressional purpose of §11503, and is supported by the legislative history.

In 1976, Congress was concerned with the bankrupt finances and deteriorating physical condition of our national rail transportation system. Congress did not consider ad valorem taxes a major cause of the crisis, nor an integral aspect of the cure. The decidedly discernible deliberate discrimination in ad valorem taxes *did* concern Congress.

Furthermore, in 1976, Congress explicitly decided that it did not recognize overvaluation within the proscribed discrimination. S.Conf. Rep. No. 94-595 and conference substitute for S.2718, 94th Cong., 2d Session (1976) Legislative History, Pub.L. No. 94-210.

With the economic crisis of the Northeastern railroads, railroad revitalization became urgent and imminent, which the 94th Congress dealt with in H.R.10979 and S.2718. Both bills contained a section on state tax discrimination. The language of each appears similar to the other. There was a critical difference, however, in the declaratory language:

H.R.10979	S.2718
§601	§27 of the Interstate Commerce Act
Sec. 28(1) Any of the following *actions* by any state, or subdivision or agency thereof, *whether any such action be taken pursuant to a constitutional provision, statute or administrative order or practice or otherwise,* it is declared to constitute an unreasonable and unjust discrimination against, and an undue burden upon, interstate commerce and is forbidden and declared to be unlawful:	Sec. 27(a) Notwithstanding the provisions of Section 202(b), any act described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It shall be unlawful for a State, a political subdivision of a State or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited *acts:*

BN argues that any tax practice which results in discriminatory treatment of a rail carrier is proscribed in §306 (§11503). The declaratory language of H.R. 10979 appears to support that claim.

The reported explanations of these two versions emphasize the serious divergence of the declaratory language. H.R.Rep. No. 94-725 on H.R.10979, and the conference committee reports, H.R.Conf.Rep. No. 94-768 and S.Conf.Rep. No. 94-595 explain H.R. 10979 as *prohibiting tax practices, including overvaluation.* Both conference reports rejected the House version. Neither S. Rep. No. 94-499 on S. 2718, nor the conference committee reports H.R.Conf.Rep. No. 94-768 and S.Conf.Rep. No. 94-595, explained S.2718 to prohibit tax practices or overvaluation.

S.Conf.Rep No. 94-595, accompanying the second conference committee substitute for S.2718, which was enacted as Pub. L. No. 94-210, in the Joint Explanatory Statement of the Committee of Conference, almost identical to the two earlier reports, above, summarized the antidiscrimination tax section in the Senate bill:

> "The Senate bill made it unlawful for any State, political division, or entity acting on behalf of the State or subdivision to commit any of the following acts: (1) the assessment of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property bears to the true market value of such property in the same assessment jurisdiction; (2) the levy or collection of the tax on an assessment unlawful pursuant to levy or collection of the tax on an assessment unlawful pursuant to (1); (3) the levy or collection of an ad valorem property tax on transportation property at a rate higher than that generally applicable to commercial and industrial property in the same assessment jurisdiction; and (4) the imposition of any other tax which results in the discriminatory treatment of any common or contract carrier subject to the Interstate Commerce Act." pp. 165-166.

It also summarized the antidiscrimination tax section in the House Amendment:

> "Part I of the Interstate Commerce Act was amended to include a new section making unlawful ad valorem State or State subdivision taxation activities. *Such prohibited tax practices included (1) overvaluation;* (2) collection

> of an unlawful tax; (3) collection of any ad valorem property tax at a higher tax rate than the tax rate generally applicable to commercial and industrial property in the taxing district; or (4) the imposition of a discriminatory 'in-lieu tax'." p. 166. [Emphasis added]

Furthermore, it explained the conference substitute antidiscrimination tax section:

> "The conference substitute follows the Senate bill except that the conferees deleted the provision making this section inapplicable to any State which had, on the date of enactment, a constitutional provision for the reasonable classification of property for State purposes and limited the provision to taxation of railroad property." p. 166.

Overvaluation as an administrative practice which constitutes unreasonable and unjust discrimination and an undue burden on interstate commerce was rejected in S.Conf.Rep. No 94-595. The more limited language of the Senate was adopted. Congress did not intend, with §306 of Pub.L. No. 94-210, to prohibit all administrative practices which result in discriminatory treatment.

S.Rep. No. 94-499 on S. 2718, explains the procedural provisions as allowing the carrier to seek an injunction before paying the disputed tax, because most state procedures require a carrier to pay the tax and then contest the collection; thus, the declaratory relief language of §306. The explanation of the procedural provisions in the two conference committee reports outline the statute, and explain that the jurisdictional grant is to remedy violations in the Section.

H.Rep. No. 94-725 on H.R.10979 94th Cong., 1st Sess. 1975, explained the need for federal district court jurisdiction.

"Railroad property tax discrimination has long been a well-recognized problem, but the procedural avenues of relief against it have not been adequate. Federal statutory law (28 U.S.C. 1341) prohibits the Federal courts from enjoining, suspending, or restraining the assessment, levy or collection of any tax under State law where a plain, speedy, and efficient remedy is available in the state courts. This provision has had the effect of closing the doors of Federal courts to railroads burdened by discrimination without giving them a "plain, speedy, and efficient" remedy under State law. The reason is that in many states suit must be brought against the tax collecting body instead of the tax assessing body. Where the county is the tax collecting body and a railroad operates in a number of counties, it must bring multiple suits to obtain relief. The Southern Pacific and its rail affiliates, as an example, had to bring 48 separate suits in 48 separate California courts to challenge the level of assessments of that railroad's property. There is no indication, under the Federal statute referred to above, of how many separate actions will be required before the Federal courts find that state remedies are not "speedy" and are not "efficient." In one decision, a district court found that 24 separate suits did not indicate a lack of adequate state remedy (Chicago & North Western Ry. Co. v. Lyons, 148 F.Supp 787 (1957)); in another case, the Supreme Court found the state remedy to be inadequate on the basis of the fact that 300 separate claims were asserted in 14 different counties, (Georgia Railroad Co. v. Redwine, 342 U.S. 299 (1952)). Relief from discrimination in the Federal courts is essential because railroads are located in numerous

standing jurisdictions and under state law may be required to bring numerous suits in various jurisdiction to obtain relief." pp. 76-77.

The 94th Congress did not find state courts inadequate. Rather, it found state procedures which require multiple suits by railroads to be inadequate. Thus Congress lifted §1341 to protect the railroads from the expense of multiple litigation. This is a procedural protection.

A review of the legislative history of the precursors to §306 of Pub.L. No. 94-210, §11503, further demonstrates that Congress did not intend the substantive provisions of §11503 to encompass claims of overvaluation, nor the procedural provisions as a remedy for all tax challenges.

The Doyle Report[9] is the genesis of §11503. It expressed concern as to the reaches of the Commerce Clause powers into state taxation, concluding that Congress may interfere with state taxing powers. The primary recommendation in the Doyle Report as to discriminatory state taxation was that railroad and pipeline right-of-way be exempted from all ad valorem taxation so as to remove the tax inequities among the interstate transportation carriers. An antidiscrimination tax statute was an additional and alternative recommendation offered to the Doyle Committee by the Association of American Railroads (AAR) as a result of the AAR's study on discrimination against railroad taxpayers subject to the same tax rates. The antidiscrimination tax language that the AAR recommended to the Doyle Committee was:

[9] Report of the Committee on Commerce, United States Senate by its Special Study Group on Transportation Policies in the United States, S.Rep. No. 87-445, 87th Congress, 1st Session, 1961, hereinafter Doyle Report.

"... declare the following action by any State, or governmental subdivision or agency thereof, whether such action be taken pursuant to a State constitutional provision, a statute, *an administrative practice, or otherwise*, to constitute an unreasonable and unjust burden upon interstate commerce and thereby forbidden and declared to be unlawful:

(a) The assessment, for the purposes of a property tax levied by any taxing district, of property owned or used by any common carrier engaged in interstate commerce at a value which bears a higher ratio to the true market value of such property than the assessed value of all other property in the taxing district subject to the same property tax levy bears to the true market value of all such property.

(b) The collection of any tax on the portion of said assessment so declared to be unlawful." Doyle Report, supra, p. 465. [Emphasis added.]

The AAR recommendation included injunctive relief in federal district courts, concurrent with the jurisdiction already conferred upon any federal or state court, notwithstanding 28 U.S.C. §1341 or the provisions of any state constitution or laws. The AAR explained the recommendation had "... the obvious merit of insuring that such carriers would receive equal treatment with other taxpayers subject to the same tax rates in accordance with applicable state laws"; and that, if enacted, such a statute would "... in no way alter(s) the freedom of the state to tax its taxpayers as in its discretion it deems best, as long as such carriers are accorded equal treatment with other taxpayers." Doyle Report, supra, p. 466.

The focus of the Doyle Report[10] in recommending this alternative remedial legislation was the deliberate lack of equalization of assessment percentages, based upon the AAR studies comparing the level of assessment, the average assessment percentage, of the aggregate assessed value of railroad property, to that of the aggregate assessed value of other property in the selected states. Additionally, the need for federal court jurisdiction to enforce this recommended remedial legislation as expressed in the Doyle Report through the AAR report was because of an inadequate or ineffective system of administrative and state court remedies to provide relief from this deliberate discrimination.

For the many bills[11] that were introduced in Congress during the fifteen (15) years following its issuance, the Doyle Report was used as the primer[12] on ad valorem taxation and the mischief of the local assessors' deliberate lack of equalization to the detriment of non-voting, investment intensified railroads and to the advantage of the voting property owners. Each of these bills dealt only with antidiscrimination, which Congress, after study by

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[10] The Doyle Report contains a lengthy analysis of commerce clause jurisprudence; outline of ad valorem tax administrative procedures, valuation, allocation, assessment; detailed explanation of the unit valuation methodologies utilized by states; AAR's statistics demonstrating deliberate higher ad valorem tax burdens on railroads. The Doyle Report acknowledged the statistics were untested AAR statistics. However, by 1967 several states had conceded the deliberate higher tax burden. Transcript of Hearing on S.927, Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 90th Cong. 1st Sess. (1967), p.8. The Doyle Report identifies the source of the discrimination as deliberate failure of the tax assessors to equalize for political reasons.

[11] H.R.7497 (1961), H.R. 736 (1964), H.R.4972 (1966), H.R.1480 (1967), H.R.16245 (1970), H.R.12891 (1974), S.2988 (1966), S.927 (1967), S.2289 (1969), S.2841 (1971), S.2362 (1971), S.3945 (1972), S.1891 (1973)

[12] The AAR witness testifying before various committees or subcommittees on antidiscrimination bills invariably requested that the Doyle Report be a part of the record of the hearings.

various committees and subcommittees and refinement of the language, turned its face against.

BN asserts §13(4) of Title 49 was the model for §11503, therefore §11503 must be construed broadly. The earlier committee reports often contained virtually verbatim sections of the written position advanced by AAR. Although review of those reports has not verified this assertion as to §13(4), that was the testimony presented in 1967.

James Ogden, representing the Association, appearing before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 1967, on S.927, testified that the language of S.927 follows the language of §13(4) of the Interstate Commerce Act in that it declares the described action by a state is unreasonable and unjust discrimination and undue burden on interstate commerce. The AAR testimony alone does not establish Congressional intent to measure state tax discrimination by reference to the objective economic impact of a state's actions rather than their purpose or intent. An economic impact test is certain to defeat taxes. Congress did consider economic impact of the proposed legislation, not only in terms of the amount of taxes paid by the railroads, but also in terms of local and state revenue losses. Letter from Department of Transportation, pp. 20-24, S.Rep. 91-630 (1969) 91st Cong., 1st Session to S.2289. Mr. Ogden's testimony is no basis for broad interpretation of the proscribed state act or federal court jurisdiction. There is no support for broad restriction on state taxation similar to broad authority of an administrative agency.

This earlier legislative history shows that throughout the fourteen (14) years between the Doyle Report and S.2718 of the 94th Congress, Congress was dealing with intentional and admitted discrimination. Upon inquiry, Congress was repeatedly told that the proposed antidiscrimination tax bill did not involve valuation. Congress was not asked to set a federal valuation standard for rail transportation property. Accordingly,Congress did not empower the federal courts to set private valuation standards.[13]

Neither Congress nor the AAR who promoted the antidiscrimination tax proposals ever intended to interfere with the states' valuation practices or that the federal district courts would determine valuation for the state. Recognizing the inferior authority of testimony, verbal or written, submitted in support or against proposed legislation, the following highlights lend insight to the congressional committees' struggle over the meaning of the AAR proposed language.

S.Rep. No. 90-1483, at p. 3, and S.Rep. No. 91-630, at p. 3, recites two ways in which discrimination can occur: higher assessment ratio or higher tax rate imposed upon interstate carriers. Testifying before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, in 1967, Mr. Ogden explains the purpose of the bill is to eliminate the dis-

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[13] It is interesting that the AAR witnesses before various committees and subcommittees repeatedly advised that valuation of the railroads' property was not affected by its antidiscrimination tax proposal.

Tax Assessments on Common Carrier Property: Hearing on H.R. 736, 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. (1964)

Tax Assessments on Common Carrier Property: Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Commerce, 89thCong., 2d Sess. (1966)

Discriminatory Taxation of Common carriers: Hearings on S. 927 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 90th Cong., 1st Sess. (1967)

State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 91st Cong., 1st Sess. (1969)

crimination. To the Chairman's query, "Doesn't your bill provide that a formula of assessment would have to be identical with respect to properties of a similar character?" Mr. Ogden: "No, Sir. Of course value is a measure or standard that would apply commonly for everything you value one kind of property by a different approach than another." p. 21. He further testified that the problem is how to persuade tax assessors to equalize and that as early as 1944, the existence of discrimination was due to a lack of equalization. Mr. Ogden testified that the equalization discrimination may be perpetuated by *de jure* classification. pp. 11 and 21. And, in support of S.927, Dr. Rolf A. Wiel, President, Roosevelt University, Chicago, Illinois, economics professor, submitted testimony that the techniques for valuing railroads are highly refined and that local assessments can be equalized by sales-assessment ratio studies. p. 66.

In reply to questions, in the transcript of Hearing Before the Subcommittee on Transportation and Aeronautics of the House of Representatives Committee on Interstate and Foreign Commerce, (1964), Mr. Ogden wrote that the proposed legislation did not have any bearing on valuation nor did it set a standard for determining value, and that it addressed narrowly defined existing discrimination which must be proved. In that written correspondence the issue was raised that the taxing jurisdictions might achieve the same resulting discrimination by substituting or adding other forms of taxation on railroads such as gross earnings tax. pp. 50-53.

The early committees studying the AAR's antidiscrimination tax bills attempted to define true market value and equalization, so as to avoid any question. H.R. Rep. No. 90-1483 and S. Rep. No. 91-630. These definitions, at best, constitute alarm on the part of Congress that the antidiscrimination tax

bills should not prohibit the state's valuation process. Those same committees were concerned that the proposal would require federal court interference with the state tax practices. To avoid expansion of the procedural provisions beyond equalization of admitted ratios, S. Rep. No. 91-630, stated:

> "... S. 927 does not require or direct that the Federal judge perform the tax assessment or tax levying function.
>
> "... the courts can and should construe this legislation to avoid any charge that a nonjudicial function is required to be performed. According to the professors' opinion there is nothing in S.927 which requires the Federal judiciary to go beyond its essential function of protecting rights given under Federal law." p. 12.

The overwhelming conclusion drawn from this early history is that Congress did not intend a broad proscription of ad valorem tax practices, nor a broad federal court remedy.

More recent history, S. Rep. No. 92-1085, 92nd Cong., 2d Sess., 1972, explained that federal court jurisdiction was needed to avoid the necessity of multiple suits in state courts and that the federal courts should balance the state's interest against the carrier's interest before relief is granted.

> "... Second, the carrier would have to make the usual showing to obtain injunctive relief. Since the measure in essence grants equity jurisdiction to the courts, it is expected that the courts will balance the adverse impact on the community of any relief granted against the benefits to be derived by the carrier from such relief. The courts are capable of fashion-

ing remedies that are not burdensome to the communities involved." p. 8.

As BN advises, Pub.L. No. 94-210 was enacted to protect and preserve the economically failing national rail transportation system. Although unmentioned as a cause of the economic decline, §306 (§11503) was enacted to protect the failing rail transportation carriers from the payment of proportionally higher state and local ad valorem taxes deliberately imposed on property used in rail transportation than was imposed on property used in other commercial and industrial enterprises within the state and its political subdivisions. The Doyle Report identified the deliberate discrimination in state and local ad valorem taxation against rail transportation property and in favor of other property, conspicuously without recommendation that Congress set a valuation standard. Legislative history did not change that course. The refinement of the language came with the concerns expressed by Congress or at the invitation of Congress. These concerns related to states rights, states need for revenue, states authority to classify, as well as, what property should be the measure for ratio discrimination, what railroad property should be protected, what should be the standard of measurement and what power should the federal courts have. S.Rep. No. 92-1085.

Legislative history affirms that by rejecting the H.R. 10979 version of the antidiscrimination tax section Congress neither intended to, nor did it, vest equitable jurisdiction in the federal district courts to superimpose their valuation judgments upon those of the taxing authorities. The technical and legalistic language was used by Congress in its specialized meaning. Section 11503 should be construed narrowly to avoid expansion of the statute beyond Congressional intent and purposes.

IV. SECTION 11503 AND OUR SYSTEM OF FEDERALISM COMPELS APPLICATION OF 28 U.S.C. §1341 OR CONSIDERATION OF THE FUNDAMENTAL PRINCIPLE OF COMITY IN SUITS BROUGHT UNDER §11503.

The Tenth Circuit decision in this case recognizes the proscription of 28 U.S.C. §1341, hereinafter §1341, and the need for judicial restraint consistent with the mandates of Congress and this Court.

The legislative history of §11503 invites the district courts to cautiously entertain claims of tax practices that result in discriminatory treatment. This history indicates Congressional intent to preserve the broad noninterference doctrine of §1341 except in limited cases where necessary to produce a speedy remedy to end the deliberate heavier tax burden imposed on rail transportation property. The history suggests Congress intended the federal courts to fashion a different "adequate, speedy and efficient remedy in state court" test, rather than an intent to completely except rail carriers from the §1341 proscription or the fundamental principle of comity.

The legislative history of §11503 indicates Congressional intent to preserve the broad noninterference doctrine of §1341. Limited situations are designated by H.R.Rep. No. 94-725 and S.Conf.Rep. No. 94-595 as warranting a grant of equitable relief to end deliberately discriminatory taxation of rail transportation property. Legislative history suggests that Congress intended a less rigorous test to determine presence *vel non* of an adequate, speedy and efficient remedy in state courts. Accordingly, specific mischiefs — multiple suits and offensive state procedures — have been removed by

§11503 from the general jurisdictional proscription of §1341.

In *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981), this Court acted to preserve the discretion of state taxing authorities. Accordingly, federal court jurisdiction will not be exercised to try the citizen's §1983 damage suit against state taxing authorities. In *McNary* noninterference is based not upon §1341, but upon the fundamental comity principle. The federal courts statutory prerogative to enforce the equal protection clause (§1983) may or may not override the broad jurisdictional proscription of §1341. Resolution of the latter issue does not dictate the *McNary* outcome. A more fundamental principle is decided: the transcendent utility of allowing to each state the power for independent management of its own fiscal affairs.

Section 11503 manifests a surgically precise Congressional intent to lift one corner of the jurisdictional ban set out at §1341. A broader reading of the legislation (§11503) risks infringement into state management of state fiscal affairs.

In §11503 Congress did not invite the railroads to litigate each dollar of ad valorem tax exposure before the federal courts. Nothing in §11503 is intended to disturb basic state-federal balance announced in *McNary* and underlying §1341.

Congress, like this Court, in *McNary*, intended to preserve the well-established and recognized jurisprudential principles of federalism. It did not intend §11503 to displace §1341. Principles of federalism compel recognition that a federal court may refuse to give its special protection to private rights when the exercise would be prejudicial to public interests. Even under §11503, a federal district court should exercise its discretionary power to grant or withhold

relief so as to avoid needless obstruction of the taxation policy of states.

The thrust of §1341, to remove from the federal courts subject matter jurisdiction to enjoin enforcement of a state tax where a plain, speedy and efficient remedy may be had in the state courts, is not defused by §11503. Legislative history suggests that federal court jurisdiction is available when offensive county by county litigation impedes the §11503 Plaintiff from acquiring a plain, speedy and efficient state court remedy. Greater reach cannot be demonstrated.

The *Lennen* decision is consistent with the decisional law in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981) and *California v. Grace Brethren Lutheran Church*, 457 U.S. 393 (1982). *Lennen* recognized the continuing proscription of §1341, and the public policy problems attendant to unrestrained judicial intervention. Given its knowledge that the same issues were then pending in the BN protest before the Oklahoma State Board of Equalization, the Tenth Circuit Court of Appeals prudently affirmed the applications of *Lennen* and the continuing proscription of §1341 to the facts now before the Court.

The proper niche of §11503 is partially defined by jurisdictional principles presumptively known to those who reported on, drafted and passed this legislation.

Private rights are not enforced by federal courts of equity if such an exercise of jurisdiction is nonessential to or incongruent with an identified public interest. Thus the §1341 policy obtained in federal court even before passage of the act itself. *Matthews v. Rodgers*, 284 U.S. 521 (1932). The same underlying principle is statutory in *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976), *Rosewell v. LaSalle National Bank*, 450 U.S.

503 (1981), and *California v. Grace Brethren Church*, 457 U.S. 393 (1982).

Mr. Justice Brennan enunciates this compelling rule twice: *Perez v. Ledesma*, 410 U.S. 82 (1971), n.17 (J. Brennan concurring in part and dissenting in part); and, *McNary*, supra. p. 197, n. 27 (J. Brennan, concurring in judgment). Enactment of §11503 does not abrogate application of the reasoning of these opinions to the case at bar.

Broad interpretation of §11503 attributes to Congress an intent which is scarcely practical. Reading *Burlington Northern Railroad v. Bair, No. 83-100-A (S.D. Iowa, July 16, 1986)* (Pet. App. 43a) and *Burlington Northern Railroad v. Department of Revenue, No. 8502102LE (D. Ore. May 6, 1986)* (Pet. App. 77a) together with the broad construction of §11503 suggests an enormous judicial burden simply to standardize treatment of a hypothetical new body of intricate federalized railroad ad valorem tax valuation cases.

In the former action (Bair) and on remand from the Eighth Circuit, the district court, in 26 pages, waded through the components and subcomponents and interworkings of Iowa's unit valuation methodology and that of BN's expert. The court superimposed its judgment on that of each appraiser, producing a judicial formula for that railroad for that tax year. The Iowa opinion demonstrates that an impermissible level of federal judicial intrusion into state tax practices will necessarily flow from broad application of §11503.

An inevitable conflict of applicable opinions and destruction of uniformity of ad valorem taxation between rail carriers arises from consideration of the district court orders in Iowa, Oregon and Washington (Pet. App. 43a-80a). *Norfolk and Western Railway Company v. Missouri State Tax Commission*, 390 U.S.

317 (1968) offers no assurances that such intricate valuation issues will not be brought to the federal courts year after year.

This is the context in which BN substantially proposes that this Court legislate a federal cause of action sounding in discrimination whenever railroad experts differ in valuation methodology from a state tax assessor. This is the context in which BN proposes that §1341 has no application to the issues before the court.

The Ninth Circuit proposed a broad reading of the substantive provisions of §11503 and a restricted reading of the procedural provisions. In *Atchison, Topeka and Santa Fe Railway Company v. Board of Equalization of California*, 795 F.2d 1442 (9th Cir. 1986), the district court was directed to abstain because of mature state litigation. The court reasoned that the important remedial objectives of Congress required consideration of every form of *de facto* tax discrimination. The Ninth Circuit found support for its conclusion that the statute plainly required true market value to be a fact question in the procedural provisions. Then, the Ninth Circuit agreed with the Tenth Circuit that Congress intended the §1341 exception to be narrow and unintrusive, in support of abstention. The OTC herein is aligned with the Ninth Circuit's position on §1341. The difficulty in the Ninth Circuit's decision is illustrated by its abstention reasoning that the state has a strong interest in insuring that its officials accurately and fairly value and assess, and that the railroads pay their fair share of taxes contrasted with its broad reading of its power to hear valuation disputes. The Ninth Circuit's reasoning that Congress failed to set a valuation guide for rail transportation property because value will be calculated for one specific taxpayer and compared to an entire industry points to

the destruction of uniformity in the administration of ad valorem taxes on rail transportation.

The Eleventh Circuit, in *Southern Railway Company v. State Board of Equalization*, 715 F.2 528 (11th Cir. 1983), relying heavily on S.Rep. No. 91-630 and the Doyle Report, found that the legislative history together with the broad language of §11503 indicated a general Congressional concern with discrimination in any guise. The court stated that the legislative history evinces an intent of Congress to exempt railroads from the §1341 proscription and the principles of comity, equating §11503 to 28 U.S. 1362. *Moe v. Confederated Salish and Keotenai Tribes, Etc.*, 425 U.S. 463 (1976). In *Moe*, this Court gave preference to the broad jurisdictional grant in 28 U.S. 1362, rather than §1341. In *Moe*, this Court, citing *Department of Employment v. United States*, 385 U.S. 355 (1966), recognized the special treatment accorded under federal law to the tribes. Although the legislative history clearly indicates a desire to protect the railroad industry from discriminatory overburdensome taxation, nowhere does that history indicate special treatment similar to the tribes. In fact the history from the Doyle Report indicates the railroads want to and Congress intends for them to pay their fair share. S.Rep. No. 91-630 and S.Rep. 90-1483.

BN asserts applicability of *Aloha Airlines v. Department of Taxation of Hawaii*, 464 U.S. 7 (1983). *Aloha* came up through the state courts on a federal question. It involved no serious federalism issue as to jurisdiction of federal courts of equity. The federal statute proscribing state taxation did not require federal interference with state tax practices. The *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961), partial invalidity issue was not involved.

BN's claim that overvaluation violates the substantive proscriptions of §11503 should be litigated

through the state courts as similarly situated state taxpayers alleging supremacy of a federal statute. *Memphis Bank and Trust Co. v. Garner*, 459 U.S. 392 (1983), *Aloha Airlines Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983) and *Wardair Canada, Inc. v. Florida Department of Revenue*, ___ U.S. ___, 106 S.Ct. 2369 (1986).

Oklahoma has adequate state court procedures to decide these issues. Even before a tax becomes due a taxpayer may seek declaratory judgment relief from constitutional infirmities. *Oklahoma Tax Commission v. Smith*, 610 P.2d 794 (Okl. 1980). 68 O.S. 1981, 68 O.S. 1981, §§2466 and 2469 provide single forum remedies for unreasonable valuation of rail transportation property. *Great Northern Life Insur. Co. v. Read*, 322 U.S. 47 (1944).

The Oklahoma remedies are certain, plain, speedy and efficient. Every taxpayer has the right to be fully heard and the right to a judicial determination which are the procedural criteria required by *Rosewell v. LaSalle National Bank, supra*. BN is not required to litigate in multiple jurisdictions in Oklahoma.

The OTC's motion to dismiss raised the absence of any allegations in the complaint that invoked jurisdiction under §11503. The motion to dismiss for lack of subject matter jurisdiction is not so intricately involved with the merits as to require trial. There is no statutory direction for procedure upon an issue of jurisdiction. The mode of its determination is left to the court. *Gibbs v. Buck*, 307 U.S. 66, (1939) and *KVOS, Inc., v. Associated Press*, 299 U.S. 269 (1936).

The power of Congress to limit state taxation is not at issue. *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450 (1959). The issues are: Whether Congress proscribed valuation prac-

tices of state ad valorem tax assessors?; and Whether Congress vested jurisdiction in the federal district courts to decide overvaluation claims? The principles of federalism compel the outcome below.

CONCLUSION

This Court should affirm the order and judgment of the Court of Appeals.

Respectfully submitted,

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